

CWA § 404(g): State and Tribal Assumption of Dredged or Fill Program

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CWA § 404(g): Overview

- ▶ What is § 404(g): Congress amended CWA to allow states and tribes to assume administration of the dredge and fill permitting program (1977 and 1987)
 - ▶ This is not a delegated program; it is a state/tribal permit under state/tribal authority
- ▶ EPA Goals
 - ▶ Support state/tribal efforts to take lead in managing their aquatic resources; WPDGs
 - ▶ Facilitate assumption efforts - FACA (2015-2017); Wheeler Letter¹; Ross Memo to RAs²
- ▶ EPA Roles
 - ▶ Prior to assumption - Work with states and tribes as requested to help them enhance capacity/capability and develop programs; Technical assistance and Wetland Program Development Grants
 - ▶ Evaluate and approve/disapprove assumption request
 - ▶ Oversight of assumed program - permit review; program changes

¹ Letter to governors. Wheeler, Andrew. September 20, 2018. <https://www.epa.gov/cwa404g/letters-governors-revising-assumption-regulations-under-cwa-section-404>

² Memo to Regional Administrators. Ross, David. May 2019.

CWA § 404(g): Authorities

- ▶ CWA § 404(g)
 - ▶ States may assume administration of the permit and enforcement program for navigable waters of the US except those used or susceptible to use as a means to transport interstate or foreign commerce and wetlands adjacent thereto
 - ▶ Corps retains § 404 permitting authority in non-assumed waters; Corps retains all Rivers and Harbors Act § 10 permitting authority in all waters.
- ▶ CWA § 404(h-l) and 40 CFR part 233 describe:
 - ▶ State and tribal program assumption requirements
 - ▶ Program administration and coordination requirements (e.g., permit review, enforcement)
 - ▶ Procedures and criteria for EPA approval and oversight of state/tribal program (e.g., 120 day approval, categories of permits EPA reviews)
 - ▶ Requirements for review and modification of state program (as necessary)

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State requirements: Part 233 subpart A (233.1 – 233.4), subpart B (233.11- 233.14)

Program approval: Subpart B (233.10, 233.15)

Revisions to state programs: 233.16

Program operation: Subpart D (233.30)

Federal oversight: subpart F (233.50-233.53)

RA approval w/ concurrence– delegation manual cpt. 2, 2-43

HW concurrence is with AA for Water, AA for OECA, and OGC

CWA § 404(g): Requirements

- ▶ A state program must be:
 - ▶ consistent with and
 - ▶ no less stringent than the Act and implementing regulations

- ▶ The state program must:
 - ▶ Have equivalent scope of jurisdiction¹
 - ▶ Regulate at least the same activities as federal program
 - ▶ Allow for public participation
 - ▶ Issue permits that comply with the 404(b)(1) Guidelines
 - ▶ Have adequate enforcement authority

¹ State or tribal program may have broader jurisdiction; however, the approved § 404 program and EPA oversight is limited to CWA jurisdictional scope

State/Tribal Permit Process - Once Assumed

- State/tribe transmits to EPA notice of every permit application received
- State/tribe sends permits to EPA where review is not waived, non-waived categories include:
 - Draft general permits
 - Discharges that may impact endangered species
 - Discharges that may adversely impact waters of another state
 - Discharges with known or suspected toxic or hazardous pollutants
 - Discharges proximal to public water supply intakes
 - Discharges within critical State/Federal areas
- State/tribe and EPA may agree to additional categories
- EPA may request to see an individual permit

State/Tribal Permit Process - Once Assumed cont.

- ▶ EPA has 90 days to provide comments, conditions or object to state/tribal permit
 - ▶ Within 30 days EPA indicates whether it intends to comment
 - ▶ Coordinates Corps, NMFS and USFWS comments
- ▶ State/tribe shall not issue a permit to which EPA has objected or placed requirements for a permit condition, until EPA's concerns are addressed
- ▶ State/tribe must either:
 - ▶ Resolve EPA conditions, concerns, or objection to a permit or
 - ▶ Deny a permit if it cannot resolve EPA's conditions/concerns/objection
- ▶ If the state/tribe neither resolves EPA's concerns or denies the permit, the permit transfers to the Corps for processing

CWA § 404(g): Current Efforts

- Providing Clarity on Assumable Waters -
 - States and Tribes have requested EPA clarify which waters are assumable so they can:
 - Develop MOA with Corps identifying retained waters
 - Design program and determine staffing and funding levels
 - EPA convened Federal Advisory Committee to provide recommendations - 2015-2017
 - Majority recommendation was Corps was to base retained waters list on existing RHA § 10 lists and to retain the portion of the adjacent wetlands waterward an agreed to administrative line
 - July 2018 Army memo to Corps supporting majority recommendation and directing Districts how to identify retained waters
 - EPA undertaking rulemaking to clarify the scope of retained waters as well as to clarify and modernize other sections of the regulations (proposal March 2020) - e.g., allow for electronic reporting
- Supporting state and tribal assumption efforts
 - Actively working with FL, AZ, OR, MN
 - Wetland Program Development Grants can be used to develop and pursue assumption

Contacts

- ▶ For EPA contacts in your region regarding assumption, see contacts on EPA 's website: <https://www.epa.gov/cwa404g>
- ▶ For information about the rulemaking effort contact:
 - ▶ Kathy Hurlid (Hurlid.Kathly@epa.gov) or Ruth Chemerys (Chemerys.Ruth@epa.gov)
- ▶ For information on this presentation contact:
 - ▶ Jeff Lapp (Lapp.Jeffrey@epa.gov)